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Nos. 84-1261 and 84-6104

In the Supreme Court of the United States

OCTOBER TERM, 1984

CONSTANTINE YAMANIS, PETITIONER

v.

UNITED STATES OF AMERICA

VINCENT CALISE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the prosecution provided reasonable notice of its intent to proceed against a defendant as a dangerous special drug offender under 21 U.S.C. 849.

2. Whether the district court properly found a defendant to be a dangerous special drug offender subject to enhanced penalties on the basis of a preponderance of the evidence.

3. Whether a defendant whose attorney withdrew prior to trial was entitled to an additional 30-day defense preparation period by the Speedy Trial Act (18 U.S.C. 3161(c)(2)).

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In the Supreme Court of the United States

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No. 84-1261

CONSTANTINE YAMANIS, PETITIONER

v.

UNITED STATES OF AMERICA

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UNITED STATES OF AMERICA

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-62a [1]) is reported at 744 F.2d 1508.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1984. A petition for rehearing in No. 84-1261 was denied on December 7, 1984. The petition for a writ of

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[1] "Pet. App." refers to the appendix to petition No. 84-1261.

certiorari in No. 84-1261 was filed on February 5, 1985; the petition in No. 84-6104 was filed on January 18, 1985. The latter petition accordingly was filed out-of-time under Rule 20.1 of the Rules of this Court.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Florida, petitioner Yamanis was convicted on one count of engaging in a criminal enterprise, in violation of 21 U.S.C. 848 (Count One), and one count of importation of marijuana, in violation of 21 U.S.C. 952 (Count Four). Petitioner Calise was convicted on one count of conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. 841 and 846 (Count Two), and one count of conspiracy to import marijuana, in violation of 21 U.S.C. 952 and 963 (Count Three). Both petitioners also were convicted on one count of possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841 (Count 5). Petitioner Yamanis was sentenced to 60 years' imprisonment and a $100,000 fine on Count One, and to five years' incarceration followed by a two-year special parole term and a $15,000 fine on Counts Four and Five, the five-year terms to run consecutively to each other and concurrently with the sentence on Count One. Petitioner Calise was sentenced to consecutive terms of five years' incarceration on Counts Two and Three and four years' incarceration on Count Five, and was fined $15,000 on each count. He also was sentenced to a concurrent 25-year term as a dangerous special drug offender under 21 U.S.C. 849.

When he was arraigned on February 3, 1982, petitioner Yamanis was represented by a retained attorney. On May 10, 1982, that attorney withdrew because of a conflict of interest. On May 11, 1982 -- after a public defender also was unable to provide representation because of a conflict -- the court appointed a private attorney as counsel for Yamanis.

Pet. App. 13a. Jury selection took place on June 1, 1982; trial began on June 7, 1982. The evidence at trial established that petitioners operated an extensive marijuana importation and distribution network (Pet. App. 4a-5a), and both petitioners (along with two co-defendants) were convicted.

On May 28, 1982, the United States Attorney filed a notice with the district court pursuant to 21 U.S.C. 849(a), asserting that petitioner Calise was a dangerous special drug offender who should be subject to enhanced penalties upon conviction (Pet. App. 43a). After the jury returned its verdict the court held a hearing on the issue, and concluded that Calise's extensive involvement in the criminal enterprise satisfied the special offender test set out in 21 U.S.C. 849(e). The court accordingly sentenced Calise to a 25-year term pursuant to 21 U.S.C. 849(b).

The court of appeals affirmed the convictions and sentences of both petitioners (Pet. App. 1a-62a). Among other things, the court rejected petitioner Calise's assertion that the government's Section 849(a) notice was untimely because it was filed three days before jury selection; the court noted that the notice had been filed prior to trial, that Calise had been given actual notice well in advance of the filing that the government intended to prosecute under Section 849, and that Calise had failed to identify any possible prejudice flowing from the timing of the filing (Pet. App. 44a-45a). The court also found that Section 849 -- which directs the court to find special offender status upon a "preponderance of the information" (21 U.S.C. 849(b)) -- satisfies the requirements of due process "[i]nsofar as it guarantees to a defendant the right to notice and a hearing, to assistance of counsel, to compulsory process, to cross-examination, to findings of fact and to appeal" (Pet. App. 50a-51a). Finally, the court held that petitioner Yamanis "first apear[ed] through counsel" within the meaning of the Speedy Trial Act, 18 U.S.C. 3161(c)(2), on February 3, 1982, rather than on May 11, 1982 (Pet. App. 15a-17a).

ARGUMENT

1. In this Court, petitioner Calise again challenges the validity of the Section 849 proceedings. In particular, he contends that he was given inadequate notice of the government's intent to proceed against him as a dangerous special drug offender. He also asserts that Section 849(b) denied him due process by permitting the district court to find him a dangerous offender on the basis of a preponderance of the evidence, rather than on proof beyond a reasonable doubt. Neither of these contentions warrants review.

Section 849(a) directs the United States Attorney to file a notice with the district court at "a reasonable time before trial" setting forth his reasons for believing the defendant to be a dangerous special drug offender. In this case, both courts below -- while acknowledging that " 'strict compliance by the Government with the statutory filing requirement is a prerequisite for an enhanced sentence' " (Pet. App. 44a, quoting *United States* v. *Noland*, 495 F.2d 529, 530 (5th Cir.), cert. denied, 419 U.S. 966 (1974)) -- found that the government's actions met this standard. A written notice was filed three days before jury selection and 10 days prior to trial (Pet. App. 45a). Equally important, petitioner Calise was orally informed well before trial that the government intended to prosecute under Section 849 (Pet. App. 44a). Calise therefore was unable to indicate to the courts below "how he would have acted differently if the notice had been filed earlier" (*id.* at 45a). In these circumstances, further review of those courts' essentially factual conclusion that notice was provided at a reasonable time is not warranted.

Petitioner Calise's constitutional claim is similarly flawed. Section 849(b) expressly provides that a district judge may impose an enhanced sentence "[i]f it appears by a preponderance of the information, including information

submitted during the trial * * * and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special drug offender * * *."[2] The function of a court in a special offender proceeding is therefore "quite similar to its function in ordinary sentencing decisions" (*United States* v. *Schell*, 692 F.2d 672, 678 (10th Cir. 1982)), where only "minimal due process protections" are required (Pet. App. 50a, citing *United States* v. *Grayson*, 438 U.S. 41 (1978) and *Williams* v. *New York*, 337 U.S. 241 (1949)). The courts of appeals accordingly are unanimous in holding that the application of a preponderance of the evidence standard in special offender proceedings satisfies the requirements of due process.[3] See, *e.g.*, *United States* v. *Davis*, 710 F.2d 104 (3d Cir.), cert. denied, 464 U.S. 1001 (1983); *Schell*, 692 F.2d at 676-679; *United States* v. *Inendino*, 604 F.2d 458, 463 (7th Cir. 1979), cert. denied, 444

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[2]To find that the defendant is a dangerous special drug offender, the court must conclude that he is a special drug offender within the meaning of 21 U.S.C. 849(e) -- that is, that he has at least two previous convictions for dealing in controlled substances (Section 849(e)(1)); that he committed the crime for which he is on trial "as part of a pattern of dealing in controlled substances," that his criminal activities "constituted a substantial source of his income," and that he "manifested special skill or expertise" in narcotics trafficking (Section 849(e)(2)); or that the crime for which he is on trial was part of "a conspiracy with three or more other persons to engage in a pattern of dealing in controlled substances" (Section 849(e)(3)). The court also must find that the defendant is "dangerous" within the meaning of Section 849(f), which directs such a finding "if a period of confinement longer than that provided for [the] felonious violation [for which the defendant is on trial] is required for the protection of the public from further criminal conduct by the defendant."

[3]The courts have not addressed the validity of 21 U.S.C. 849. They have, however, repeatedly considered challenges to 18 U.S.C. 3575, which provides for increased sentences for dangerous special offenders who have committed crimes unrelated to controlled substances. Aside from Section 849's references to controlled substances, the two statutes have an essentially identical language and structure. The cases cited in text involved Section 3575.

U.S. 932 (1979); *United States* v. *Williamson*, 567 F.2d 610, 615 (4th Cir. 1977); *United States* v. *Bowdach*, 561 F.2d 1160, 1172-1175 (5th Cir. 1977); *United States* v. *Stewart*, 531 F.2d 326, 332-335 (6th Cir.), cert. denied, 426 U.S. 922 (1976).[4]

In reaching this conclusion, the courts have recognized that a preponderance of the evidence standard follows directly from the balancing of interests that is central to a due process analysis. The government, of course, "has legitimate interests in protecting society from an individual who is likely to engage in further criminal conduct" (*Schell*, 692 F.2d at 678). Yet petitioner Calise's proposed standard might make protection of these interests impossible: as the Court has noted in the context of civil commitment proceedings, "there is a serious question as to whether a state could ever prove beyond a reasonable doubt" that an individual is likely to be dangerous. *Addington* v. *Texas*, 441 U.S. 418, 429 (1979). See *Davis*, 710 F.2d at 107. Conversely, the risk of an erroneous finding by the sentencing court is no greater here than it is in other types of sentencing proceedings. See *Schell*, 692 F.2d at 678. Because special offender provisions "do[] not create a new and distinct criminal charge" but instead "* * * provide[] for an

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[4]Petitioner Calise acknowledges that the courts of appeals have upheld the validity of 18 U.S.C. 3575(e)(1), but suggests (84-6104 Pet. 8) that a different analysis should apply in a challenge to 18 U.S.C. 3575(e)(2) or (3) (and therefore in a challenge to 21 U.S.C. 849(e)(2) or (3)). See n.2, *supra*. This contention is insupportable. The decisions cited by Calise (84-6104 Pet. 8) did not address the constitutionality of 18 U.S.C. 3575(e)(2) or (3), and therefore cast no doubt on the validity of those provisions. In any event, "subsections [(2) and (3)], like subsection (1), merely introduce circumstances in aggravation of the offense for which the conviction was obtained" (Pet. App. 52a); Calise has offered no reason to conclude that different analyses should apply to the different subsections.

increase in the penalty for the offense itself" (*Williamson*, 567 F.2d at 614), there is no reason to question the balance struck by the various courts of appeals.[5]

2. Petitioner Yamanis contends that he was not afforded the 30-day preparation period guaranteed by 18 U.S.C. 3161(c)(2), which provides that "trial shall not commence less than thirty days from the date on which the defendant first appears through counsel." Although Yamanis first appeared with his retained attorney on February 3, 1982, some four months prior to trial, he contends that he was entitled to an additional preparation period following the appointment of new counsel on May 11, 1982, 20 days prior to trial (84-1261 Pet. 5-8). This argument plainly lacks

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[5]Petitioner Calise is incorrect in contending (84-6104 Pet. 9) that a contrary conclusion is compelled by *Specht* v. *Patterson*, 386 U.S. 605 (1967). The statutory scheme at issue in *Specht* provided that a defendant convicted of certain sex offenses could be subjected to a psychiatric examination under a separate sex offenders statute and, if found to be dangerous, could be sentenced under that statute. *Id.* at 607. The *Specht* Court found this scheme to be constitutionally infirm because a defendant facing proceedings under the sex offenders statute -- who in effect was confronted with "a new charge" (*id.* at 610) -- was not permitted to "be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own" (*ibid.*). In contrast to *Specht*, special offender statutes of the type at issue here "do[] not create a new and distinct criminal charge. Rather, the dangerous special offender criteria provide for an increase in the penalty for the offense itself," while "the conduct embraced within the criteria must be factually related to the felony for which the sentence is imposed." *Stewart*, 531 F.2d at 332. In any event, 21 U.S.C. 849(b) itself expressly provides all of the procedural guarantees mentioned in *Specht*. See Pet. App. 50a-51a. *Specht* nowhere suggested that, in addition, a sentencing judge must base his findings on proof beyond a reasonable doubt; indeed, the *Specht* Court expressly reaffirmed the flexibility accorded judges in sentencing proceedings. See 386 U.S. at 606, 608. Despite petitioner Calise's suggestion to the contrary (84-6104 Pet. 9), the courts of appeals are in complete agreement on this. See *Davis*, 710 F.2d at 107 & n.1; *Schell*, 692 F.2d at 677-678; *Bowdach*, 561 F.2d at 1172-1174; Pet. App. 51a.

merit. As the court of appeals noted, petitioner Yamanis's approach entirely "ignores the plain meaning of the phrase 'first appears through counsel,' " for "[w]hen employing the term 'first,' Congress presumably did not have *subsequent* appearances in mind" (Pet. App. 15a; emphasis in original).

While petitioner Yamanis contends (84-1261 Pet. 6-9) that the holding below is in conflict with *United States* v. *Daly*, 716 F.2d 1499 (9th Cir. 1983), that decision provides no support for his request for an additional preparation period. In *Daly* one attorney was appointed for the sole purpose of representing the defendant at a bail hearing; a different attorney was appointed to represent the defendant at trial. The Ninth Circuit held that the 30-day period ran from the defendant's first court appearance with trial counsel. 716 F.2d at 1504-1505. But, as petitioner Yamanis acknowledges (84-1261 Pet. 7-8), the Ninth Circuit emphasized that its holding was a narrow one (716 F.2d at 1505):

> [T]he 30-day period begins to run when an attorney appears on a defendant's behalf after the indictment or information has been filed, unless there is an indication that the attorney is appearing only for a limited purpose and will not further represent that defendant at trial. If the attorney has been appointed to represent the defendant only for a specific pre-arraignment purpose or at the time of his initial appearance prior to the filing of the indictment or information disavows his intent to represent the defendant further, the period will not commence * * * .

As the court below expressly noted (Pet. App. 16a n.5), petitioner Yamanis cannot prevail under the Ninth Circuit's approach. Yamanis's original attorney "entered a *general* appearance by notice of appearance filed February 3, 1982," and at the arraignment "neither explicitly nor implicitly disavowed his intent to represent Yamanis at later

stages, including trial" (*ibid.*; emphasis in original). Indeed, had the attorney been hired to represent Yamanis only at the arraignment, "it is unclear how [he] was later put in the position of having to withdraw as trial counsel on conflict grounds" (*ibid.*). The court of appeals therefore noted that there was no " 'indication that the attorney [was] appearing only for a limited purpose and [would] not further represent that defendant at trial' " (*ibid.*, quoting *Daly*, 716 F.2d at 1505). In these circumstances, Yamanis's claim that he was entitled to additional trial preparation time is insupportable.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1985

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[6] *United States* v. *Rojas-Contreras*, cert. granted, No. 84-1023 (Feb. 19, 1985), which presents the question of when a defendant is entitled to a new defense preparation period following the return of a superseding indictment, involves neither the same statutory language ("first appears through counsel") nor the same policy considerations (see Pet. App. 16a n.5) as does this case. There accordingly is no reason to hold this petition pending disposition of *Rojas-Contreras*.

DOJ-1985-04